

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

V.

STATE OF WASHINGTON, et al.,

Defendants.

Case No. C70-9213

Sub-proceeding No. 17-sp-01

ORDER GRANTING S'KLALLAM AND
SQUAXIN ISLAND TRIBES' MOTIONS
FOR SUMMARY JUDGMENT AND
DENYING SKOKOMISH INDIAN
TRIBE'S CROSS-MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on the Jamestown S’Klallam and Port Gamble S’Klallam Tribes’ (collectively “S’Klallam”) and Squaxin Island Tribe’s (“Squaxin”) motions to dismiss, or in the alternative, for summary judgment, and Skokomish Indian Tribe’s (“Skokomish”) cross-motion for summary judgment. Dkts. #21, #23 and #32.¹ In addition, the Court resolves what remains of Skokomish’s motion to stay the proceedings. Dkt. #19.

¹ These filings appear at Dkts. #21495, #21498 and #21513 in the main case, *USA v. Washington*, C70-9213RSM. For ease of reference, the Court will cite only to the subproceeding docket number in the body of this Order, unless it is citing to filings in a different proceeding.

1 S'Klallam requests that the Court grant it summary judgment on three bases: 1) the
2 Skokomish request for determination is procedurally improper because the Skokomish fail to
3 allege which jurisdictional provision they invoke; 2) the Skokomish request is legally invalid
4 because it violates a settlement agreement: The Hood Canal Agreement; and 3) the Court has
5 previously determined, unambiguously, that the Skokomish U&A is the Hood Canal and its
6 drainage basin, and therefore it is not entitled to any ruling that it has primary fishing rights
7 outside of that established U&A. Dkt. #21 at 3-5. The Squaxin move for summary judgment
8 on essentially the same bases, albeit with slightly different legal arguments, and include an
9 additional argument for dismissal on the basis that Skokomish failed to follow the pre-filing
10 requirements established by this Court. Dkt. #23.²

12 Skokomish have opposed the S'Klallam and Squaxin motions and also move for
13 summary judgment in their favor. Dkt. #32. Skokomish assert that they have complied with
14 all pre-filing requirements and have appropriately asserted jurisdiction over this matter, and
15 argue that both this Court and the Ninth Circuit Court of Appeals have already determined that
16 their U&A and primary fishing right extend beyond the Hood Canal and its drainage basin. *Id.*
17 Accordingly, they assert that summary judgment in their favor is appropriate.

19 The matter having been fully briefed, and having determined that oral argument is not
20 necessary in this matter, the Court now GRANTS S'Klallam's and Squaxin's motions for
21
22
23

24 ² The Swinomish Indian Tribal Community (“Swinomish”) and the State of Washington
25 support dismissal of the Skokomish Request for Determination on the bases argued by
S'Klallam and Squaxin, and oppose Skokomish's cross-motion for summary judgment. Dkts.
26 #31 and #38.

1 summary judgment for the reasons set forth herein, and DENIES Skokomish's cross-motion
2 for summary judgment.

3 **II. BACKGROUND**

4 On April 27, 2017, Skokomish filed an *ex parte* Motion for Leave to File a New
5 Subproceeding. Dkt. #1. The motion was granted, and Skokomish filed their Request for
6 Determination ("RFD") in this matter. Dkts. #2 and #3. In their RFD, Skokomish seek the
7 following relief:

8

- 9 (A) An Order confirming the Skokomish Indian Tribe's right to take fish and
10 to exercise Skokomish's primary right within those portions of
Skokomish (or Twana) Territory lying outside of the Hood Canal
Drainage Basin; and
- 11 (B) A preliminary and permanent injunction prohibiting interference with the
12 Skokomish Indian Tribe's right to take fish and to exercise Skokomish's
13 primary right within those portions of Skokomish (or Twana) Territory
lying outside of the Hood Canal Drainage Basin

14 Dkt. #3 at 8.

15 After the Court issued its Order Regarding Initial Disclosures and Joint Status Report,
16 the parties engaged in a Rule 26(f) conference. During that conference, Skokomish was
17 informed that some parties planned to file motions to dismiss for failure to follow pre-filing
18 requirements and for lack of jurisdiction. *See* Dkt. #19. Accordingly, on May 31, 2017,
20 Skokomish filed a motion requesting a stay of the deadlines set forth in the Court's Order
21 Regarding Initial Disclosures and Joint Status Report, and asking the Court to direct the parties
22 to return to mediation. *Id.*

23 On June 2, 2017, the Court held a telephonic status conference to discuss the motion
24 made by Skokomish. Ultimately, the Court stayed the pending initial disclosures and joint

1 status report headlines, but deferred any ruling on whether the parties should return to
2 mediation. Dkt. #20.

3 The current motions to dismiss, or alternatively for summary judgment, followed and
4 are now ripe for review.

5 **III. DISCUSSION**

6 **A. Legal Standards**

7 *1. Motions to Dismiss Under 12(b)(6)*

8 S'Klallam and Squaxin initially bring their motions pursuant to Federal Rule of Civil
9 Procedure 12(b)(6) for Plaintiff's failure to state a claim upon which relief may be granted. On
10 a motion to dismiss for failure to state a claim under Rule 12(b)(6), all allegations of material
11 fact must be accepted as true and construed in the light most favorable to the nonmoving party.

12 *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, the Court is
13 not required to accept as true a "legal conclusion couched as a factual allegation." *Ashcroft v.*
14 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
15 (2007)). The Complaint "must contain sufficient factual matter, accepted as true, to state a
16 claim to relief that is plausible on its face." *Id.* at 678. This requirement is met when the
17 plaintiff "pleads factual content that allows the court to draw the reasonable inference that the
18 defendant is liable for the misconduct alleged." *Id.* Absent facial plausibility, a plaintiff's
19 claims must be dismissed. *Twombly*, 550 U.S. at 570.

20 The Court typically limits its Rule 12(b)(6) review to allegations set forth in the
21 Complaint. Here, all parties request that the Court examine documents outside the Complaint,
22 and have moved for summary judgment in the alternative. Although the Court recognizes that
23

1 it can take judicial notice of most of the offered documents, in an abundance of caution the
2 Court converts these motions to ones for summary judgment, and will analyze them under the
3 applicable summary judgment standard.

4 *2. Motions for Summary Judgment*

5 Summary judgment is appropriate where “the movant shows that there is no genuine
6 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.
7 R. Civ. P. 56(a), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In ruling on
8 summary judgment, a court does not weigh evidence to determine the truth of the matter, but
9 “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d
10 547, 549 (9th Cir. 1994) (*citing Federal Deposit Ins. Corp. v. O’Melveny & Meyers*, 969 F.2d
11 744, 747 (9th Cir. 1992)). Material facts are those which might affect the outcome of the suit
12 under governing law. *Anderson*, 477 U.S. at 248.

14 The Court must draw all reasonable inferences in favor of the non-moving party. *See*
15 *O’Melveny & Meyers*, 969 F.2d at 747, *rev’d on other grounds*, 512 U.S. 79 (1994). However,
16 the nonmoving party must make a “sufficient showing on an essential element of her case with
17 respect to which she has the burden of proof” to survive summary judgment. *Celotex Corp. v.*
18 *Catrett*, 477 U.S. 317, 323 (1986). Further, “[t]he mere existence of a scintilla of evidence in
19 support of the plaintiff’s position will be insufficient; there must be evidence on which the jury
20 could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 251.

22 The parties have cross-moved for summary judgment. However, cross motions for
23 summary judgment do not warrant the conclusion that one of the motions must be granted.
24 The Court must still determine whether summary judgment for either party is appropriate. *See*
25

Fair Housing Council of Riverside County, Inc. v. Riverside Two, 249 F.3d 1132, 1136-1137 (9th Cir. 2001).

B. Alleged Pre-Filing Deficiencies

As an initial matter, the Court addresses Squaxin’s argument that this Court lacks jurisdiction over the Skokomish Request for Determination (“RFD”) because they failed to comply with the pre-filing requirements. Dkts. #23 at 11-2. Prior to bringing new subproceedings in this matter, parties must comply with Paragraph (b) of Final Decision #1, 384 F. Supp. at 419, as modified by this Court’s August 23, 1993 Order Modifying Paragraph 25 of Permanent Injunction (Case No. 70-9213, Dkt. #13599). That Order provides:

To invoke this court's continuing jurisdiction, the party seeking relief shall initiate a subproceeding in this action by filing a request for determination. Subproceedings will be conducted in accordance with the following procedures:

(1) Before a request for determination is filed . . . , the party seeking relief (“requesting party”) shall meet and confer with all parties that may be directly affected by the request (“affected party”) and attempt to negotiate a settlement of the matter in issue. . . . In addition to other matters the parties may wish to address, the parties shall discuss at the meeting (A) the basis for the relief sought by the requesting party; (B) the possibility of settlement; (C) whether the matter is properly one for the Fisheries Advisory Board (FAB); (D) identification of technical issues relevant to the matter in controversy, areas of agreement and disagreement on such issues, and methods for developing an agreed technical basis to narrow or resolve the controversy; (E) whether independent extra-judicial actions . . . may remove the need for or warrant deferral of an adjudication; (F) whether earlier rulings of the court may have addressed or resolved the matter in issue in whole or in part; and (G) whether the parties can agree to mediation or arbitration of the issues before or in lieu of litigation. The parties shall continue to meet and negotiate as long as there appears to them to be a substantial possibility of settlement. . . .

Case No. 70-9213, Dkt. #13599 at 2-4.

1 Squaxin argues that Skokomish's meet and confer and mediation did not conform to
2 the requirements of ¶ 25(b)(1) in several ways. First, Squaxin asserts that Skokomish, during
3 the meet and confer, "at best" stated an intent to adjudicate this matter under ¶ 25(a)(6)
4 regarding an additional U&A and a primary fishing right in the "entire Satsop Fishery". Dkt.
5 #23 at 11. However, in contrast to that position, Squaxin notes that Skokomish now seeks a
6 determination through its RFD of a much larger U&A and a primary fishing right in all or part
7 of the "entire Satsop Fishery" and in the southwestern Puget Sound inlets and the freshwaters
8 that flow into them where Squaxin has adjudicated U&A. *Id.* Squaxin asserts those areas were
9 never discussed at the meet and confer. Accordingly, Squaxin argues that significant
10 differences exist between the "matter in issue" as presented at the meet and confer and the
11 RFD, namely (1) the geographic area where Skokomish asserts previously adjudicated U&A
12 and primary fishing rights, and (2) the kind of relief it seeks – *i.e.*, confirmation of previously
13 adjudicated rights, as opposed to a declaration of additional U&A under ¶ 25(a)(6) and a
14 primary fishing right that had never been litigated. *Id.*

15
16 Second, Squaxin argues that ¶ 25(b)(1)(F) requires that Skokomish have "discuss[ed]"
17 at the meet and confer "whether earlier rulings of the court may have addressed or resolved in
18 the matter in issue in whole or in part". Dkt. #23 at 12. Squaxin asserts that Skokomish did
19 not discuss at the meet and confer its current claim that it possesses previously adjudicated
20 U&A and a primary fishing right outside of Hood Canal. *Id.* Squaxin further asserts that
21 Skokomish did not mention its interpretation of the Court's 1984 decision until March 9, 2017,
22 well after it had concluded the meet and confer and mediation. *Id.*

1 Finally, Squaxin argues that Skokomish violated ¶ 25(b)(1)(A)'s requirement that the
2 parties "discuss" at the meet and confer "the basis for the relief sought by the requesting party."
3 Dkt. #23 at 12. Squaxin asserts that at the meet and confer, Skokomish generally described
4 some anthropological and historical evidence that it intended to use to support its claim to
5 U&A and primary fishing rights in the entire Satsop Fishery, but did not take the position that
6 it would seek the Court's continuing jurisdiction to confirm that the "entire Satsop Fishery",
7 much less all of the area described in George Gibbs' journal (Finding of Fact #353), had
8 previously been adjudicated as Skokomish U&A with a primary fishing right.³ *Id.*

9
10 Skokomish responds that it satisfied the pre-filing requirements. Dkt. #32 at 16-21.
11 Skokomish notes that a meet and confer was held on November 4, 2015, followed by a
12 mediation (demanded by Skokomish) that took place on April 28-29, 2016. Dkt. #32 at 16.
13 Further, on April 29, 2016, Skokomish agreed to keep mediation open until July 31, 2016, to
14 further consider "requests, comments and questions."⁴ *Id.* Skokomish asserts that if no
15 settlement could be reached by July 31, 2016, then commencing August 1, 2016, it was free to
16
17

18
19 ³ In its Answer to the RFD, the State of Washington states "[t]he Skokomish Tribe's Request
20 for Determination (RFD) appears to rely on a completely different legal theory than what had
been presented at the Meet and Confer." Dkt. #27 at 2.

21
22 ⁴ Skokomish have cited to at least one exhibit, an email dated June 14, 2016 at 1:25 pm,
without providing a copy of that email to the Court through a Declaration or otherwise, and
without citing to any specific docket number where it might appear elsewhere in the record.
See Dkt. #32 at 16. Accordingly, the Court is unable to consider that exhibit. Further,
Skokomish cite to other emails without identifying specifically where they appear in the
record, *i.e.*, an email dated August 5, 2016 at 8:55 a.m., although the Court has managed to
locate it. The Court does not appreciate the assumption that it will scour a docket containing
tens of thousands of documents in an effort to locate certain exhibits, and reminds Skokomish
of its obligation under Federal Rule of Civil Procedure 56(a) to support motions for summary
judgment with specific citations to the record.

1 file a Request for Determination, which it did. *Id.* On August 5, 2016, Skokomish wrote to
2 the mediator and counsel stating that because no settlement had been reached, it intended to
3 file a Request for Determination, the scope of which had been “modified . . . based on the
4 comments and legal concerns raised by parties to *US v. Washington* and other Indian tribes.”
5 Dkt. #23-3, Ex. 13. Skokomish did not explain how the scope had been modified. *Id.*

6 The Court does not agree with Skokomish that these actions are “entirely consistent
7 with the principals espoused in Paragraph 25(b).” *See* Dkt. #32 at 17. As Squaxin points out,
8 these procedures require the parties to negotiate and mediate issues in a meaningful way, and
9 to seriously explore the potential for compromise, before initiating a formal proceeding. Dkt.
10 #23 at 11. It should be very clear to the parties by now that these procedures are intended to
11 reduce litigation, conserve the Court’s and the parties’ resources, and make subproceedings
12 more efficient and manageable by narrowing inter-party disputes. While, Skokomish argues
13 that the parties were well aware of its position now raised in the instant proceedings, primarily
14 referring to arguments made in other cases, it also acknowledges that it modified the scope of
15 its RFD after mediation was completed. This “modification” was clearly different than what
16 was actually discussed at the meet and confer, and defeats the purpose of any meaningful
17 attempt to resolve the issue amongst the tribes. As a result, the Court agrees that Skokomish
18 failed to follow the pre-filing procedures prior to filing the instant suit, and the Court could
19 dismiss this matter on that basis. However, as further discussed below, there are additional
20 reasons for dismissal.
21
22

23 ///
24
25 ///
26

1 **C. Lack of Jurisdiction Under Paragraph 25**

2 S'Klallam and Squaxin argue that this Court lacks jurisdiction to hear Skokomish's
3 RFD because Skokomish fail to invoke jurisdiction under any specific subsection of Paragraph
4 25(a). Dkts. #21 and #23. Instead, Skokomish initiated this subproceeding through an RFD
5 that generally invokes Paragraphs 25(a)(1)-(a)(7) of Final Decision #1, 384 F. Supp. at 419, as
6 modified by this Court's August 23, 1993 Order Modifying Paragraph 25 of Permanent
7 Injunction (Case No. 70-9213, Dkt. #13599). *See* Dkt. # 3 at ¶ 3.12. Skokomish makes no
8 effort to identify which of these subparagraphs provides jurisdiction over the relief it seeks.
9

10 Paragraph 25 of the Permanent Injunction, as modified, instructs the parties as follows:

11 25. (a) The parties or any of them may invoke the continuing jurisdiction
12 of this court in order to determine:

13 (1) Whether or not the actions intended or effected by any party
14 (including the party seeking a determination) are in conformity with Final
15 Decision #1 or this injunction;

16 (2) Whether a proposed state regulation is reasonable and
17 necessary for conservation;

18 (3) Whether a tribe is entitled to exercise powers of self-
19 regulation;

20 (4) Disputes concerning the subject matter of this case which the
21 parties have been unable to resolve among themselves;

22 (5) Claims to returns of seized or damaged fishing gear or its
23 value, as provided for in this injunction;

24 (6) The location of any of a tribe's usual and accustomed fishing
25 grounds not specifically determined by Final Decision #1; and

26 (7) Such other matters as the court may deem appropriate.

1 Case No. 70-9213, Dkt. #13599 at 1-2. Skokomish's RFD does not implicate matters under
2 25(a)(2), (a)(3) or (a)(5), therefore those subsections cannot confer continuing jurisdiction in
3 this Court. Skokomish oddly states, “[t]he Request for Determination is correctly brought
4 pursuant to Paragraphs (a)(1) through 25(a)(7), as the participants cannot agree on the
5 applicability of any one subsection.” Dkt. #32 at 21. Even if that was accurate with respect to
6 the parties' agreement or disagreement as to which subsection invoked jurisdiction, it is of no
7 import. It is Skokomish's burden, as the filing party, to identify the basis of jurisdiction.
8 Skokomish fails to do so.
9

10 Moreover, Skokomish's reliance on other general bases for federal jurisdiction does
11 not salvage their position. They have filed a RFD pursuant to this Court's continuing
12 jurisdiction as set forth in the injunction issued by Judge Boldt more than 40 years ago. To
13 take advantage of that continuing jurisdiction, Skokomish must comply with Paragraph 25 of
14 Final Decision #1 as modified by this Court's August 23, 1993 Order Modifying Paragraph 25
15 of Permanent Injunction. Case No. 70-9213, Dkt. #13599. That includes identifying a specific
16 basis of jurisdiction. On Reply in support of their cross-motion for summary judgment,
17 Skokomish suggests that either 25(a)(1) or 25(a)(6) are the appropriate bases for jurisdiction.
18 *See* Dkts. #32 and #41. Setting aside that this Court is not required to guess at the asserted
19 basis for jurisdiction, it will assume for the sake of argument that Skokomish adequately
20 pleaded these subsections.
21

22 Paragraph 25(a)(1) provides the Court with jurisdiction to determine whether actions
23 by a party are in conformity with Judge Boldt's findings in Final Decision # 1. While Paragraph
24 25(a)(1) jurisdiction comes into play where there is potential ambiguity in Judge Boldt's
25
26

1 findings, Paragraph 25(a)(6) provides jurisdiction to resolve “the location of any of a tribe’s
2 usual and accustomed fishing grounds [(“U&A”)] not specifically determined by Final
3 Decision # 1.” Paragraph 25(a)(6) jurisdiction is thus contingent on the Court’s finding, or the
4 parties agreeing, that the disputed waters in question were not specifically determined by Judge
5 Boldt. For the reasons discussed below, neither of these subparagraphs confer jurisdiction over
6 the RFD because there is no ambiguity in Judge Boldt’s determination of the Skokomish U&A,
7 and the scope of that U&A has been determined in a manner contrary to the assertions now
8 made by Skokomish.
9

10 **D. Skokomish U&A and Primary Right**

11 As noted above, Skokomish have asked the Court for:

12 (A) An Order confirming the Skokomish Indian Tribe’s right to take fish
13 and to exercise Skokomish’s primary right within those portions of
14 Skokomish (or Twana) Territory lying outside of the Hood Canal
Drainage Basin; and

15 (B) A preliminary and permanent injunction prohibiting interference with
16 the Skokomish Indian Tribe’s right to take fish and to exercise
17 Skokomish’s primary right within those portions of Skokomish (or
Twana) Territory lying outside of the Hood Canal Drainage Basin . .
18 . . .

19 Dkt. #3 at 8. Thus, the Court finds it appropriate to proceed initially under Paragraph 25(a)(1)
20 in order to determine whether the waters “lying outside of the Hood Canal Drainage Basin”
21 have already been determined to be part of Skokomish’s U&A, as described by Judge Boldt in
22 Findings of Fact 137 in Final Decision # 1. Only if that question cannot be resolved by looking
23 at the record before Judge Boldt, and should the Court find that Skokomish’s U&A in question
24 was not specifically determined in Final Decision # 1, would it be appropriate to turn to
25 Paragraph 25(a)(6) for further proceedings.
26

Judge Boldt's original court decision regarding the Skokomish U&A, found in Finding of Fact 137, provides as follows:

The usual and accustomed fishing places of the Skokomish Indians before, during and after treaty times included all the waterways draining into Hood Canal and the Canal itself.

United States v. Washington, 384 F. Supp. 312, 377 (1974). There is no ambiguity in that decision.⁵ However, Skokomish argue that its U&A was further defined as part of a 1984 subproceeding before United States District Judge Craig, and rely on that alleged expanded scope of their U&A to support their instant RFP and request for summary judgment. Dkt. #32.

On March 22, 1984, Judge Craig issued an “Order Adopting the Special Master’s Report and Recommendation Re Skokomish Indian Tribe’s Request for Determination of Primary Right in Hood Canal Fishery.” 626 F. Supp. 1405, 1486 (W.D. Wash. 1984), *aff’d* 764 F.2d 670 (9th Cir. 1985). In that Order, Judge Craig found that:

The Skokomish Indian Tribe holds the primary right to take fish in Hood Canal and on all rivers and streams draining into Hood Canal south of the line displayed on Exhibit A (attached to Special Master's Report and Recommendation, etc.) commencing on the west shore of Hood Canal at Termination Point and following the course of the Hood Canal Floating Bridge to the east shore of the canal.

Id. at 1486-87. In reaching that conclusion, Judge Craig “fully” adopted the Findings of Fact in the Special Master’s Report and Recommendation. *Id.* at 1487. One such Finding of Fact provided:

In his 1854-55 journal, George Gibbs, a lawyer, ethnographer and secretary to the 1855 Treaty Commission, described Skokomish (or Twana) territory as:

⁵ Skokomish agree that there is no ambiguity in the scope of their U&A, but focus on their 1984 primary right subproceeding rather than on Judge Boldt's decision. Dkt. #32 at 4. For the reasons discussed herein, that focus is misplaced.

1 Extend[ing] from Wilkes' Portage northwest across to the arm
2 of Hood Canal up to the old limits of the Tchimakum, thence
3 westerly to the summit of the Coast Range, thence southerly to
4 the head of the west branch of the Satsop, down that branch to
5 the main fork, thence east to the summit of the Black Hills, then
6 north and east to the place of beginning.

7 (Tr. at Hearing, p. 29-30.) Gibbs' description of Twana territory
8 embraces Hood Canal and its drainage basin northward along the canal to
9 the point on the west shore now known as Termination Point, which was
10 the southern limit of the Tchimakum shown on a map prepared by Gibbs
11 in 1856. (Ex. SK-SM-4; *see also* Ex. SK-SM-5 for contemporary names).
12 Gibbs' description of Twana territory was based on information gathered
13 from Indians at and before the treaty councils and at contemporaneous
14 meetings. The Court finds it to be the best available evidence of treaty-
15 time locations of Twana territory.

16 626 F. Supp. at 1489. Skokomish asserts that there is no ambiguity in that determination and
17 asserts that Judge Craig, in adopting the Finding of Fact, thereby determined that its U&A
18 encompassed the entire area described by Mr. Gibbs. Dkt. #32. In further support of their
19 position, Skokomish point to an Order referring the matter to the Special Master for "the issue
20 of determining the 'usual and accustomed fishing grounds' of the Skokomish Tribe," as
21 evidence that Judge Craig ultimately expanded their U&A to the area described by Mr. Gibbs.
22 Dkt. #32 at 1-2. As a result, Skokomish now argue that they are entitled to the relief they seek
23 through the current RFD, and that all other parties are precluded from challenging such a
24 finding. Dkt. #32. The Court disagrees.

25 As an initial matter, Skokomish has blatantly misrepresented the record in the 1984
26 subproceeding.⁶ Skokomish rely heavily on Judge Craig's Order referring the subproceeding

25 ⁶ That misrepresentation has caused this Court to consider sanctions, as further discussed
26 below.

1 to a Special Master, arguing that the purpose of the referral was to determine the scope of its
2 U&A, as demonstrated by the language of Order of referral. Dkt. #32 at 9. However,
3 Skokomish ignore that the Order of reference upon which they rely was expressly amended to
4 make clear that the Skokomish U&A was not at issue in that subproceeding; rather, the
5 subproceeding was to determine whether Skokomish had a primary right in the Hood Canal
6 and its drainage basin – the very U&A defined by Judge Boldt. Dkt. #23-3, Ex. 9. The
7 amended Order stated:

8 The court has previously made an Order of Reference to the Special
9 Master to determine usual and accustomed fishing grounds of the
10 Skokomish Indian Tribe. **It appears that the request of the tribe was
11 for determination of the primary right of Skokomish Indian Tribe in
12 Hood Canal Fishery. The previous Order of Reference to the Special
13 Master is therefore amended to cover the determination of this
14 request.**

15 *Id.* (emphasis added).

16 Moreover, the RFD filed in the 1984 subproceeding expressly stated that Skokomish
17 were seeking a resolution of whether it had a primary right in the U&A already determined by
18 Judge Boldt. Dkt. #22, Ex. F. That context is important. The subproceeding simply did not
19 adjudicate the scope of the Skokomish U&A. Indeed, Judge Boldt’s original ruling establishes
20 the standard for what a tribe must demonstrate to prove off-reservation fishing rights at usual
21 and accustomed grounds and stations. A tribe must provide evidence of fishing grounds where
22 its members “customarily fished from time to time at and before treaty times, however distant
23 from the then usual habitat of the tribe” *United States v. Washington*, 384 F. Supp. 312,
24 332 (1974). The phrase “usual and accustomed” applies in a restrictive sense and does not
25 apply to sites used only occasionally or incidentally. *Id.* at 356. As the State of Washington
26

1 points out, Mr. Gibbs' description of Twana territory did not identify or discuss any locations
2 where fishing occurred. Further, Skokomish cite no legal authority for their assertion that Mr.
3 Gibbs' reference to Twana "territory" – by itself and without supporting evidence of regular
4 and customary fishing practices at identified locations – satisfies the standard to establish
5 additional U&A. *See* Dkt. #38.

6 Having reviewed all of the arguments made by S'Klallam and Squaxin in their motions
7 for summary judgment, as well as those of the other supporting Tribes and the State of
8 Washington, the Court agrees that Judge Boldt's determination of the Skokomish U&A was
9 unambiguous, and that the 1984 subproceeding neither changed that determination nor
10 expanded it. Accordingly, the Court rejects the arguments by Skokomish that any party is
11 precluded from challenging the scope of the U&A Skokomish now asserts. Further, the Court
12 finds it unnecessary to specifically address whether the RFD filed in the instant subproceeding
13 is precluded by the Hood Canal Agreement. *See* Dkt. #21. Likewise, because Judge Boldt's
14 original determination is not ambiguous, there is no need to engage in a Paragraph 26(a)(6)
15 analysis. The RFD will be dismissed with prejudice for all of the reasons above.
16

17 **E. Sanctions**

18 Although not specifically requested by the S'Klallam and Squaxin, the Court has
19 considered whether sanctions are appropriate against Skokomish for bringing this matter. The
20 Court is concerned with the way Skokomish presented the record of the underlying proceedings
21 in an attempt to support their legal claims and circumvent jurisdictional issues in this
22 proceeding. What the Court finds particularly egregious is the fact that Skokomish not only
23 misrepresented what the Special Master was tasked with reviewing, but that even after several
24
25

1 parties pointed out the Order Skokomish relied on had been amended to clarify the nature of
2 the subproceeding, Skokomish failed to correct the record, and indeed failed to acknowledge
3 their misrepresentation at all. *See* Dkt. #41.

4 There are serious ramifications for this conduct, as it greatly affects the way this Court
5 views its ongoing jurisdiction over these matters. For 40 years this Court has interpreted Judge
6 Boldt's findings, and there are questions as to how many genuine disputes actually remain. As
7 this Court has noted in other Orders:

8 . . . Judge Andrew Kleinfeld eloquently stated in his dissent from the
9 amended opinion filed in the dispute between the upper Skagit Indian
10 Tribe and the Suquamish Indian Tribe (Subproceeding 05-03),

11 Continually revisiting Judge Boldt's decades-old opinions (and
12 the limited record supporting them) in an attempt to discern what
13 he thought the customs of multiple peoples were in the 1850's
14 and earlier, besides being extremely burdensome and expensive,
15 is a fundamentally futile undertaking. The truth is not knowable.
16 "This exercise is not law, and is not a reliable way to find facts,
17 so it is hard to see why courts are doing it and how it could be
18 preferable to the Indian tribes working some dispute resolution
19 system out for themselves."

20 *United States v. Washington*, 20 F. Supp.3d 899, 986 (W.D. Wash. Dec. 5, 2012) (citations
21 omitted). Bringing disputes such as the instant one, where the filing party has failed to engage
22 in the proper pre-filing requirements, has failed to identify the basis for continuing jurisdiction,
23 and has misrepresented the record in what appears to be an attempt to circumvent the
24 limitations of this Court's continuing jurisdiction, only bolsters the idea that perhaps the sun
25 has set on Judge Boldt's injunction and this Court's continuing jurisdiction under it.

26 Ultimately, the Court will not order sanctions here. However, Skokomish, and in fact
27 all of the Tribes, are reminded that their actions may ultimately be the impetus for the

1 dissolution of any oversight by this Court. This reminder should be the driving force behind
2 real efforts to resolve matters without Court intervention, and motivation to engage in genuine
3 attempts to resolve conflicts without asking the Court to do so for them. Time and time again,
4 this Court has stated that the Tribes are in the best position to craft agreements that will
5 adequately meet their needs. This matter is no different.

6 **IV. CONCLUSION**

7 Having reviewed the parties' motions, the briefs in opposition thereto and in support
8 thereof, along with the Declarations and Exhibits and the remainder of the record, the Court
9 hereby finds and ORDERS:

- 11 1. S'Klallam's Motion to Dismiss or in the Alternative Motion for Summary
12 Judgment (Dkt. #21) is GRANTED for the reasons set forth above.⁷
- 13 2. Squaxin's Motion to Dismiss Skokomish Indian Tribe's Request for
14 Determination Or, In the Alternative, Motion for Summary Judgment (Dkt. #23)
15 is GRANTED for the reasons set forth above.⁸
- 16 3. Skokomish Indian Tribe's Cross-Motion for Summary Judgment (Dkt. #32) is
17 DENIED.⁹ This case is dismissed with prejudice and is now CLOSED.
- 18 4. Skokomish Indian Tribes' Motion for Order to Stay (Dkt. #19), what remains of
19 it, is DENIED AS MOOT.¹⁰

21
22

⁷ Dkt. #21495 in the main case, *USA v. Washington*, C70-9213RSM.

23 ⁸ Dkt. #21498 in the main case, *USA v. Washington*, C70-9213RSM.

24 ⁹ Dkt. #21513 in the main case, *USA v. Washington*, C70-9213RSM.

25 ¹⁰ Dkt. #21494 in the main case, *USA v. Washington*, C70-9213RSM.

1 DATED this 30th day of August 2017.

2 
3

4 RICARDO S. MARTINEZ
5 CHIEF UNITED STATES DISTRICT JUDGE
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26